

Exhibit F

United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Dey, Inc., et al.,
Civil Action No. 05-11084-PBS

Exhibit to Plaintiff's Memorandum In Support of United States' Motion
In Limine Regarding Testimony of Raymond C. Winter and
Sequencing of Deposition Testimony

CAUSE NO. GV002327

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
ex rel.)
VEN-A-CARE OF THE)
FLORIDA KEYS, INC.,)
Plaintiff,)
)
VS.) TRAVIS COUNTY, TEXAS
)
DEY, INC.; ROXANE)
LABORATORIES, INC.;)
WARRICK PHARMACEUTICALS)
CORPORATION; SCHERING-)
PLOUGH CORPORATION;)
SCHERING CORPORATION;)
LIPHA, S.A.; MERCK-LIPHA,)
S.A.; MERCK, KGAA; AND EMD)
PHARMACEUTICALS, INC.,)
Defendants.) 53RD JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF

ROBERT FRANCIS MOZAK
VOLUME IV

March 13, 2003

COPY

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11 *****

12 ORAL AND VIDEOTAPED DEPOSITION OF

13 ROBERT FRANCIS MOZAK

14 VOLUME IV

15 March 13th, 2003

16 *****

17 ORAL AND VIDEOTAPED DEPOSITION OF

18 Robert Francis Mozak, produced as a witness at the
19 instance of the Relator and duly sworn, was taken in
20 the above-styled and numbered cause on the 13th of
21 March, 2003, from 9:37 a.m. to 7:22 p.m., before
22 Debra L. Sietsma, CSR in and for the State of Texas,
23 reported by machine shorthand, at 300 West 15th
24 Street, 9th Floor, Austin, Texas, pursuant to the
25 Texas Rules of Civil Procedure and the provisions as
previously set forth.

1 APP E A R A N C E S
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19 ALSO PRESENT:
20

21 Mr. John Maloy Lockwood, M.D.
22 Mr. Brian Bobbitt, Videographer
23
24
25

1 25's?

2 A. Yes, yes, sir.

3 Q. Okay.

4 A. Beyond that, I don't believe there was any
5 other document that I turned over that had not already
6 been produced. Not that I'm aware of, anyway.

7 MR. BREEN: Well -- let me see the
8 February '92 document.

9 I'm going to hand you what's been
10 previously marked as Exhibit 459 in this case.

11 I don't know if you've got a copy of
12 that, Steve; but there's another one.

13 THE WITNESS: Uh-huh.

14 MR. FLECKMAN: Thanks, Jim.

15 Q. (BY MR. BREEN) And it purports to be a -- a
16 Dey Laboratories memorandum dated 24 February, 1992 to
17 Pam Marrs, Charles Rice, Jean-Paul Termier (sic)
18 and -- from Mr. Robert F. Mozak, and it appears to be
19 signed "Bob."

20 Do you see that?

21 A. Yes, I do.

22 Q. And it's a multipage document --

23 A. Uh-huh.

24 Q. -- bearing Bates stampers -- Bates Stamp
25 Nos. DL-TX-90851, 52, 53, 54 and 55.

1 Do you see that?

2 A. Yes, I do.

3 Q. And have you ever seen this document before?

4 A. Well, I -- obviously, I've seen it, since I
5 wrote it back in '92. I don't think I've seen it
6 since. It did -- I -- I -- I did see it recently in
7 February, but prior to that I -- I had forgotten about
8 it totally. Obviously, I did see it in 1992.

9 Q. You saw it recently in February. Is that --

10 A. Yes.

11 Q. And where did you see it recently in
12 February?

13 A. It was -- it was shown to me by the Dey
14 attorneys.

15 Q. By the Dey lawyers?

16 A. Yes.

17 Q. Okay. When you -- were you employed by Dey
18 when they showed you this document in February of --

19 A. No, I was not.

20 Q. All right. And which lawyers showed this
21 document to you?

22 A. I think Darrell did, Darrell --

23 Q. Okay.

24 A. -- Prescott.

25 Q. And when Mr. Prescott showed you the document

1 which is marked Exhibit 459 at this point, did you
2 have a recollection of having authored it?

3 A. Yes, I did.

4 Q. All right. So you remember writing this --
5 authoring this document, correct?

6 A. Yes, I do.

7 Q. And the -- do you know if Dey Laboratories
8 provided a copy of this document to its counsel at any
9 time since October 6th, 1997?

10 A. You mean prior to this February?

11 Q. Anytime since October 6th, 1997, did Dey
12 Laboratories provide a copy of Exhibit 459 to its
13 counsel?

14 A. Well, they must have, because it's here. I
15 assume they did recently.

16 Q. Recently?

17 A. Yes.

18 Q. You assume Dey Laboratories did recently?

19 A. Yes.

20 Q. Okay. Why do you assume that Dey
21 Laboratories provided a copy of what is Exhibit 459 to
22 its counsel recently?

23 A. Because they -- I -- I think they came into
24 the office and actually did a -- a secondary look
25 through files, and this one popped -- popped up.

1 Q. Okay. Where did it pop up from?

2 A. I don't know. I think -- I -- I think I
3 was -- I think it mentioned -- they mentioned to me it
4 came from Charles Rice's files.

5 Q. Charles Rice's files?

6 A. Yeah.

7 Q. Okay.

8 A. I believe that's -- I believe that's what I
9 was told.

10 Q. All right.

11 A. Or his office, at least.

12 Q. Okay. And Charles Rice is one of his --
13 the -- is one of the addressees on this memo, isn't
14 he?

15 A. Yes.

16 Q. Okay. How about Jean-Pierre Termier? Who is
17 Jean-Pierre Termier?

18 A. He was the CEO at that point in time.

19 Q. He was the CEO of Dey Laboratories?

20 A. That's correct.

21 Q. As of 24 February, 1992?

22 A. Yeah, at that point.

23 Q. And today he is the CEO of Liphatech?

24 A. No. He left when Charles Rice took over and
25 he -- he went back to Liphatech for a number of years, and

1 I believe he retired a couple of years ago.

2 Q. Liphia is Dey's parent, correct?

3 A. Yes.

4 Q. All right. And did Jean-Paul Termier (sic)
5 ever have any supervisory responsibility for any of
6 Dey's operations while he was at Liphia?

7 A. Yes. He was the CEO. He was in charge of
8 the whole company.

9 Q. When he was at Liphia?

10 A. Excuse me. He was -- when he -- oh, when he
11 was at Liphia did he have any?

12 Q. (Nods head affirmatively).

13 A. Not -- well, not really. I -- I mean -- no.
14 He had another job. I think he had another job,
15 actually.

16 Q. Okay. Who at Liphia had supervisory
17 responsibility over Dey Laboratories once
18 Jean-Paul (sic) ceased to become the CEO of Dey?

19 MR. HUDSPETH: Objection, form.

20 THE WITNESS: I'm trying to remember. I
21 think -- I think Charles Rice reported to a gentleman
22 by the name of Treilles, Mr. Treilles --

23 Q. Okay.

24 A. -- in France.

25 Q. Okay. Mr. Treilles in France?

1 told you to prepare the memoranda re Albuterol pricing
2 strategies which is now Exhibit 459?

3 A. No, no. That's not what you asked me.

4 Q. Well, my -- my question is: Who told you to
5 prepare this?

6 A. I prepared the memo. I -- I thought your
7 question was who prepared the pricing.

8 Q. Who told you to prepare Exhibit 459?

9 A. Oh, I -- I'm sure I prepared it.

10 Q. Who told you to do it?

11 A. Who told me to do it?

12 I don't know. I think this -- what
13 this -- I can't say that anybody actually told me to
14 do it. Some of the information that I have in here I
15 got from a secondary source, as I was just mentioning
16 to you. This was apparently a -- a premarketing
17 meeting to try to establish a pricing structure for a
18 new generic product, Albuterol unit dose.

19 MR. BREEN: Would you hand Mr. Mozak a
20 copy of his November 1st, 2001 deposition, please.

21 Q. (BY MR. BREEN) And I'll ask, Mr. Mozak, that
22 you open it to Page 85, and I'm going to direct your
23 attention to Line 19. And I'm going to -- I'm going
24 to ask that you read the -- I'm going to go through
25 the -- a couple of the questions and answers here.

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1 Then I'm going to ask you some questions from them.

2 On Line 19, Question: "So is spread the
3 difference between what is reimbursed to those vendors
4 and the amount that they actually paid to acquire the
5 product?"

6 Answer: "Yes."

7 Question: "Is it Dey's policy to market
8 the spread in its interaction with its customers?"

9 Answer: "No, it's not."

10 Question: "Has Dey ever engaged in the
11 practice of marketing the spread?"

12 Answer: "Not to my knowledge."

13 Question: "If it came to your attention
14 that your employees were engaged in the practice of
15 marketing the spread, would you condone that
16 practice?"

17 Answer: "No, I would not."

18 "I represent" -- Question: "I represent
19 to you that Mr. Rice was, shall we say, adamant that
20 he did not condone the practice of marketing the
21 spread. Do you share that feeling?"

22 Answer: "Yes, I do."

23 Now, do you recall being asked those
24 questions and giving those answers on November 1st,
25 2001?

1 A. Yes, I do.

2 Q. All right. Now, I'll ask that you go to
3 Exhibit 459, and I'll specifically --

4 A. To -- oh, yeah, 469 (sic).

5 Q. -- direct your attention to the second page,
6 Bates-stamped DL-TX-0090852. Do you see that? It
7 says "Objectives" at the top under "Pricing."

8 A. Oh, yes, yes.

9 Q. All right. And then there's objectives on
10 there, and look at the third one. It says, "To
11 provide incentive to retail/chain providers to use
12 Dey's Albuterol UD by increasing the spread on
13 Medicare/Medicaid reimbursements."

14 Do you see that?

15 A. Yes, I do.

16 Q. And you wrote that on there, didn't you?

17 A. Yes, I did.

18 Q. All right. Now, were you aware that you had
19 prepared an Albuterol pricing strategy whose -- at
20 least one objective was "to provide incentive to
21 retail/chain providers to use Dey's Albuterol UD by
22 increasing the spread on Medicare/Medicaid
23 reimbursements"?

24 Were you aware that you prepared a
25 strategy with that objective when you gave the answers

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1 A. I -- in this context, I -- I take exception
2 to the use of "marketing strategy of spreads," because
3 all we were doing is establishing a price.

4 And to answer your question, no, I
5 didn't discuss that with anybody at Lipha.

6 Q. But Mr. Rice, in his sales commentaries,
7 would -- would -- would provide Merck with that
8 information about the spread, wouldn't it?

9 MR. FLECKMAN: Objection, form.

10 Q. (BY MR. BREEN) Wouldn't he?

11 A. I'm not aware of what he put in his
12 commentaries.

13 Q. All right. We'll get -- we'll get back to
14 that.

15 Now, Mr. Termier went to Lipha after he
16 left Dey Laboratories --

17 A. Yes, he did.

18 Q. -- correct?

19 And he was fully aware -- and I'll --
20 let me use your words. He was fully aware that it was
21 Dey's pricing strategy to provide incentives to
22 providers to use Dey's products by increasing the
23 spread on Medicare and Medicaid reimbursements,
24 correct? Mr. Termier knew that that was Dey's pricing
25 strategy?

1 A... Yes. He was -- he received this memo and --
2 and I believe he was present at the meeting when we
3 talked about it.

4 Q. Okay. And -- and after going to Lipha, did
5 anybody at Lipha ever instruct you or anybody else at
6 Dey, to your knowledge, that they should not follow
7 the pricing strategy that is stated in your memo dated
8 February 24th, 1992?

9 MR. FLECKMAN: Objection, form.

10 THE WITNESS: No. Nobody instructed me.

11 Q. (BY MR. BREEN) Now -- let me see Cromolyn.

12 Did Dey continue to follow the pricing
13 strategy that was announced in your memo of
14 February 24th, 1992 all the way up until the time you
15 left the company?

16 MR. GAYNOR: Objection, form.

17 THE WITNESS: I believe in establishing
18 a -- a price for a new generic, we followed
19 essentially the same guidelines that we were advised
20 by First DataBank, which was to set the AWP at
21 approximately, you know, the area of ten percent below
22 the branded product and the WAC price at somewhere
23 between 15 and 25 percent below the AWP price. This
24 was the advice we got from First DataBank.

25 And whenever we were the first generic

1 Q. (BY MR. BREEN) All right. Well, let's do --
2 let me -- let me do it this way.

3 Would you please look at what's been
4 marked as Exhibit --

5 A. Because we've talked about spread a lot of
6 times. Excuse me. Maybe I shouldn't interrupt.

7 MR. BREEN: Counsel, I don't have a
8 question pending right now.

9 THE WITNESS: Okay.

10 MR. BREEN: And I would object to the
11 witness' comments as nonresponsive. Move to strike.

12 Would you please show the witness what
13 has been marked as Exhibit 476.

14 THE WITNESS: Thank you.

15 Q. (BY MR. BREEN) Okay. This purports to be a
16 Cromolyn sodium nebulizer solution marketing plan?

17 A. Yes, sir.

18 Q. Bates-stamped DL-TX-0091006. I believe it's
19 sequential up to 91074.

20 A. Okay.

21 Q. Have you ever seen this before?

22 A. Yes, I have.

23 Q. Purports to be dated December 15th, 1993,
24 prepared by Robert Ellis?

25 A. Yes, sir.

1 Q. Did Mr. Ellis work for you?

2 A. Yes, he did.

3 Q. Okay.

4 A. Not directly, but he was in my department.

5 Q. All right. And was Mr. Ellis -- was part of
6 his responsibilities to carry out Dey's pricing
7 strategy of providing incentives to retail/chain
8 providers to use Dey's products by increasing the
9 spread on Medicare/Medicaid reimbursements?

10 A. Well, I think he was following the same
11 procedure we did with Albuterol, which was to -- since
12 Cromolyn was the first generic on the market, we --
13 the only guideline that we had was the branded product
14 Intal. And so we followed the same pricing strategy
15 of establishing our first products -- first prices on
16 the marketplace, and that would have been basically
17 the same idea. We -- we -- we set an AWP at
18 approximately ten percent or so below the branded AWP,
19 and we established a WAC price that was somewhere 15
20 to 25 percent below that.

21 So on the -- so the answer to your
22 question, he was -- yes. He was following the same
23 strategy of establishing a price for a new generic
24 product on the marketplace.

25 Q. Could you please go to Page 48 of the

1 marketing plan, which is Bates-stamped 0091054?

2 A. Yes. I see it.

3 Q. And you see where it -- it says, "Control and
4 Implementation Aqueous Cromolyn" at the top?

5 A. Oh, yes, yes.

6 Q. Three is "Pricing," and then there's the
7 "Objectives" there.

8 Do you see that?

9 A. Yes, I do.

10 Q. And one of the objectives is "To seek the
11 highest prices possible in retail, home care and
12 hospital segments."

13 Do you see that?

14 A. Yes, I do.

15 Q. And the next -- next one is "To maximize
16 Dey's profitability."

17 Do you see that?

18 A. Yes.

19 Q. And then the fourth one is "To provide
20 incentive to retail/chain providers to use Dey's
21 Cromolyn by increasing the spread on Medicare/Medicaid
22 reimbursements."

23 Do you see that?

24 A. Yes, sir.

25 Q. How would increasing the spread on

1 how large Merck is internationally in its sales, or
2 was during your tenure there?

3 A. I believe that figures of about -- around
4 5 billion, but that includes a lot of kinds of
5 businesses. It's not just pharmaceutical business.
6 About 2 -- maybe 2 billion of it is pharmaceutical.
7 The rest is dyes and chemicals and a whole variety of
8 other things.

9 Q. Okay. Did any of the Dey University classes
10 or presentations or training sessions, to your
11 knowledge, ever deal in any manner with this issue of
12 the reimbursement spread that you spoke about in your
13 memo dated February 24th, 1992?

14 A. Dey University?

15 Q. Correct.

16 A. No, I don't believe so.

17 Q. But that issue of the reimbursement spread
18 was part of the training presentations that were --
19 that were provided during the national sales
20 conferences in 1994 and 1995, correct, the national
21 sales meetings?

22 A. I -- I don't believe that, you know, we had,
23 quote, a "training" on -- at a national sales meeting
24 on -- on reimbursement spreads. I mean we -- we -- we
25 didn't use -- we didn't use reimbursement as a -- as a

1 principal way of -- of promoting our products. We
2 used the features and benefits.

3 Our training always centered around, you
4 know, product features, product benefits. There may
5 have been occasional discussions. Certainly, reps
6 occasionally brought up the question of spread; and
7 there may have been occasional questions, and there
8 may have been an occasional discussion of it. But it
9 was not a principal, you know, thing that we -- we got
10 involved with.

11 Q. Now, the -- the -- the classes or the
12 presentations that were given at the national sales
13 meetings, they were approved by you, weren't they?

14 A. Well, I -- I -- I guess, since I was
15 responsible for the overall meeting, then I would have
16 had responsibility for what the agenda was. I did
17 look at the agendas, yes.

18 Q. Now, these national sales meetings occurred
19 annually, correct?

20 A. Usually.

21 Q. Okay. And -- and -- and the agenda would be
22 prepared in advance by a -- a group of senior people
23 at a manager's meeting, correct?

24 A. Yes, yes.

25 Q. And you would -- you would run those

1 manager's meetings, correct?"

2 A. Yeah. I would be -- yeah. I would certainly
3 be in that meeting, yes.

4 Q. All right. So the -- the final approval of
5 the agenda and the courses to be taught or
6 presentation to be made at the national sales meeting
7 was your final approval, correct?

8 A. I guess I would have to take responsibility
9 for that, yes.

10 Q. Now, let me show you what's been marked as
11 Exhibit 460 in this -- in these depositions. It
12 purports to be a -- an excerpt from the 1995 national
13 sales meeting. Specifically I'll direct your
14 attention to the first page, DL-TX-0090875. It talks
15 about "AWP Reimbursement: Why it's important, how it
16 is calculated and what that means in terms of
17 reimbursement from the third-party payers to the
18 managed care organizations."

19 I'll ask that your counsel hand that to
20 you and that you look at that.

21 Do you recall authorizing a presentation
22 at the 1994 national sales meeting on AWP -- 1995
23 national sales meeting on "AWP Reimbursement: Why
24 it's important, how it is calculated and what that
25 means in terms of reimbursement from the third-party

1 " payers to the managed care organizations"?

2 A. Well, I mean I -- you know, since I was
3 responsible for the meeting -- I -- I'm not sure if I
4 exactly saw this document before it was presented.
5 But, certainly, if it was presented there, I would
6 certainly have been aware of it.

7 Q. So I'll ask the question again: At the
8 national sales meetings that you were responsible for,
9 were your sales personnel trained about reimbursement
10 spread resulting from AWP representations made by Dey
11 Laboratories?

12 A. Well, I -- I think it's clear from the
13 documentation that our -- our sales representatives
14 were doing a -- a promotion between unit dose and
15 multidose during that '95 period, and I -- and I -- I
16 believe that's what this purports to be. And so, yes,
17 that would have been something that, since I was at
18 the meeting, I would have had to be responsible for.

19 Q. Okay. So you're -- you're talking about
20 the -- the sales -- the sales policy and procedure
21 where your salespeople were supposed to market Dey's
22 unit-dose Albuterol by showing customers how they
23 could make more profit on reimbursement than they
24 could on Warrick's multidose Albuterol, correct?

25 A. Yes, sir. That's -- that was something that

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1 was done in -- in '95 and maybe early '96, and I think
2 at that point it ended.

3 Q. Okay.

4 A. We didn't do it any longer.

5 Q. And that was -- that was Dey's sales policy
6 and practice to have its salespeople go out and make
7 that kind of marketing presentation, correct?

8 A. Well, I wouldn't call it -- characterize it
9 as a policy. It was a promotion that one of our, I
10 guess, sales or marketing people put together for
11 comparing the reimbursement between unit dose and
12 multidose, yes.

13 Q. And -- and your -- your regional sales
14 managers like Rick Upp would -- would direct their
15 salespeople to make those types of presentations,
16 correct?

17 A. Yes. From the reports I've seen, that's
18 correct.

19 Q. All right. And -- and -- and in January
20 1994, were you the executive vice-president of sales
21 and marketing at that time?

22 A. Yes, I was.

23 Q. So you would have approved the presentations
24 made at the national sales meetings?

25 A. Well a lot of these presentation were done in

1 small groups. This was -- I don't know whether this
2 was a -- a -- a general group presentation or whether
3 this was just done in a small group. Many times they
4 had small group presentations and somebody was asked
5 to put together a presentation on -- on different
6 subjects. Sometimes it was on retail pharmacies.
7 Other times it could have been on hospitals, and
8 apparently this was one that was done on this. So,
9 yeah, it did -- obviously did take place, and I don't
10 know -- I don't particularly remember whether I was
11 involved in this particular presentation or not, but
12 it probably did take place.

13 Q. Now, you're referring again to the 1995
14 presentation which is part of the exhibit that I --

15 A. Yes.

16 Q. -- you've got in front of you?

17 My -- my question was going to go to
18 the '94 sales meeting but -- but I'll understand your
19 response to be referring to the '95 sales meeting,
20 correct, when you were just answering my question?

21 A. Well, I'm not sure which is which now --

22 Q. All right. Okay.

23 A. -- to be honest with you.

24 MR. BREEN: All right. I think it's
25 time to take our agreed lunch break.